PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

IN THE

Supreme Court of the United States

NO. 622 ..... TERM, 194...

THE DRAVO CONTRACTING COMPANY,
a Corporation, Petitioner,

v.

ERNEST K. JAMES, as an Individual and as State Tax Commissioner of the State of West Virginia,
Respondent.

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INDEX.

PAGE

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit 1

Summary and Short Statement of the Matter Involved 1

Brief in Support of Petition 9
Opinions Below 9
Jurisdiction 9
Questions Presented 9
The Record in the Circuit Court of Appeals.... 10
Statement of the Case 10
Specification of Errors to be Urged..... 17
Argument 18

I.

The Circuit Court of Appeals Erred in Directing That an Apportionment of Petitioner's Income Should Be Made Upon the Basis of the Place of Occurrence of the Activities Upon Which Payments Were Made 18

II.

The Circuit Court of Appeals Erred in Refusing to Enjoin the Collection of the Entire Tax 36

Conclusion 39

Citations.

CASES

James v. The Dravo Contracting Company, 302 U. S. 134 .....3, 19, 30, 34

Ford Motor Co. v. Beauchamp, 308 U. S. 331....19, 30

Hans Rees' Sons v. North Carolina, 283 U. S. 123 .....30, 32, 35

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of The Dravo Contracting Company, a corporation, respectfully shows:

I.

Summary and Short Statement of the Matter Involved.

This is a suit in equity brought in the District Court of the United States for the Southern District of West Virginia by The Dravo Contracting Company, your petitioner, as plaintiff, against respondent, as an individual and as State Tax Commissioner of the State of West

Virginia, to restrain the collection of privilege taxes assessed against your petitioner in the amount, including penalties, of $135,761.51.

The District Court decreed petitioner liable for taxes in the principal sum of $63,214.25, with interest, as hereinafter set forth. Upon appeal, the Circuit Court of Appeals for the Fourth Circuit reversed this decree and remanded the case under an order that would result in a tax upon petitioner of $108,814.67.

The statute involved herein is known as the Gross Sales and Income Tax Law of the State of West Virginia. It provides for "annual privilege taxes" on account of "business and other activities" and imposes, upon every person engaged or continuing within said state, in the business of contracting, a tax "equal to two per cent (2%) of the gross income of the business".

Your petitioner is a Pennsylvania corporation engaged in the general contracting business. Its principal office and plant are at Pittsburgh, Pennsylvania. It is admitted to do business in West Virginia. During the years 1932 and 1933 your petitioner entered into four contracts with the United States for the construction of locks and dams in the Kanawha River and locks in the Ohio River within the territorial limits of West Virginia.

Each contract required the petitioner to furnish all labor and materials and to perform all work required "for the consideration of the sum based on designations and unit rates specified in the schedule appended" to each contract. In other words, these contracts were unit price contracts. The items designated for unit price payments consisted generally of units of linear, square, cubic, or avoirdupois measurement of materials or work, together with lump sums for certain units of

machinery and equipment. Monthly or semi-monthly partial payments were provided for as the work progressed. In addition, further provision was made for the inclusion in said monthly partial payments of specified percentages of certain of the unit prices.

All payments under said contracts were received by petitioner at its office in Pittsburgh, Pennsylvania. None was received in West Virginia.

The activities of your petitioner in the performance of said contracts were carried on in part at the respective work sites in West Virginia and also at its office and plant in Pennsylvania and elsewhere outside West Virginia. The respondent, as State Tax Commissioner, assessed your petitioner with gross income taxes in the sum of $135,761.51 (including penalties) for the years 1933 and 1934 upon the entire gross amounts received from the United States Government under those contracts.

This suit has previously been before this Honorable Court, *James v. Dravo,* 302 U. S. 134, upon an appeal by the present respondent from a decree by a statutory three-judge court granting a permanent injunction against the collection of the entire tax, upon the ground that the tax imposed an unconstitutional burden upon the operations of the Federal Government. Upon that appeal the decree of the lower court was reversed. In the majority opinion delivered by Mr. Chief Justice Hughes, this Court held that the tax imposed no unconstitutional burden upon the operations of the Federal Government and that, in so far as territorial jurisdiction was concerned, the state had authority to impose the tax upon the activities of your petitioner at the respective work sites within West Virginia. This Court further held, however, that unless the activities, which

were the subject of the tax, were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax and that, as the record disclosed activities not within the territorial limits of said state, an apportionment would, in any event, be necessary to limit the tax to activities over which the state had jurisdiction. The cause was remanded for further proceedings in conformity with said opinion.

Your petitioner thereafter renewed its application for an injunction in the District Court on the grounds that (1) the income attributable to its taxable activities was not ascertained or identified, and (2) the statute made no provision for an arbitrary or artificial method of apportionment. Respondent, on the other hand, contended that, under the opinion of this Court, petitioner's entire income, except certain partial payments made upon delivery of materials at petitioner's plant and upon fabrication thereof, was derived from taxable activities.

The District Court sustained petitioner's contention that the income attributable to its taxable activities was not ascertained or identified and expressly overruled respondent's contention that petitioner's entire income, with the exception of the partial payments specified, was derived from taxable activities. Said court, however, held that, under the opinion of this Court, some apportionment was mandatory, and disregarding the absence of statutory authorization, directed that petitioner's income be apportioned upon the basis of the ratio of petitioner's costs incurred within West Virginia, to petitioner's total costs in the performance of its contracts.

Without waiving their respective objections to the method of apportionment directed, the parties thereupon entered into a stipulation as to petitioner's costs.

After an allocation of certain disputed items by the court, a decree was entered, based on the cost ratio mentioned, adjudging your petitioner liable for taxes in the principal sum of $63,214.25 with interest, as above stated. Both your petitioner and respondent appealed from said decree to the United States Circuit Court of Appeals for the Fourth Circuit.

The principal questions raised upon the appeal of your petitioner were (1) the validity of the method of apportionment adopted by the District Court, in the absence of statutory provision therefor; (2) whether the income attributable to petitioner's taxable activities within West Virginia was ascertained or identified through partial payments made or otherwise; and (3) if your petitioner's taxable income was not ascertained or identified, whether any apportionment could be made, in the absence of statutory provision therefor.

Upon his appeal, respondent again asserted that the partial payments specified were alone exempt from the tax.

On September 6, 1940, the Circuit Court of Appeals handed down its decision. In an opinion delivered by Parker, Circuit Judge, the Circuit Court held that, in the absence of statutory authorization, no method of apportionment could be devised and applied, and accordingly held that the apportionment made by the District Court on a cost ratio basis could not be sustained. Said court further expressly held that if any *method* of apportionment was necessary to separate, from the remainder, the portion of the income which the state had jurisdiction to tax, the tax would unquestionably be void in its entirety.

The Circuit Court of Appeals held, however, that this Honorable Court had theretofore sustained the tax,

although the point that the tax was imposed on income derived partly from out-of-state activities, with no provision for apportionment, was expressly raised and argued. This fact was held conclusive, not only as to the validity of the tax, but also as to the fact that no artificial method of apportionment was contemplated by this Court when the case was remanded.

The Circuit Court of Appeals further pointed out that, except for deliveries of material and the fabrication thereof at the Pittsburgh plant of petitioner, upon which partial payments were made, all activities upon which payments were made, occurred within West Virginia and, as a result thereof, concluded that the income derived from all payments made upon activities occurring within West Virginia was subject to the taxing power of the state.

The Circuit Court of Appeals accordingly concluded that the entire income of petitioner, except the relatively small partial payments made upon delivery of materials at petitioner's plant and upon the fabrication thereof, was taxable. Said court accordingly reversed the decree of the District Court and remanded the cause, directing the entry of a decree enjoining the collection of only those portions of the taxes assessed upon the income derived from the partial payments specified. Said decision, if permitted to stand, would render petitioner liable to taxes in the sum of $108,814.67, as above stated.

A certified copy of the printed record of said case in the Circuit Court of Appeals, together with a supplement containing the proceedings in the Circuit Court of Appeals, are submitted herewith and made a part of this petition.

Your petitioner believes that the decision of the Circuit Court of Appeals in this case is erroneous and that this Honorable Court should require that said case should be certified to it for review and adjudication in accordance with existing laws. As reasons relied on for the allowance of the writ, it asserts:

First: The decision of the Circuit Court of Appeals, upon the question of the apportionment of the gross income of petitioner, a foreign corporation, for the purpose of the West Virginia annual privilege tax imposed on account of business and other activities in the business of contracting and measured by a percentage of the gross income thereof, holding that all payments made to petitioner *upon* activities or events occurring within West Virginia are taxable, without regard to the extent to which those payments were attributable to or derived from activities carried on outside West Virginia, is a decision of a federal question in a way probably in conflict with the decision of this Court heretofore made in this case and probably in conflict with other applicable decisions of this Court.

Second: That the decision of the Circuit Court of Appeals, which subjects to the operation of the statute known as the West Virginia gross sales and income tax, a large part of the income of your petitioner derived from activities carried on outside the territorial limits of the State of West Virginia is a decision of a federal question in a way probably in conflict with the decision of this Court heretofore made in this case and probably in conflict with other applicable decisions of this Court, and if permitted to stand, will result in the taking of your petitioner's property without due process of law in violation of Section 1 of the Fourteenth

Amendment of the Constitution of the United States.

The position of your petitioner will be further elaborated in the supporting brief submitted herewith.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in this case—No. 4654 June Term, 1940, on its docket—to the end that said case may be reviewed and determined by this Court as provided by law; that the order of said Circuit Court of Appeals be reversed by this Court; and that your petitioner may have such other and further relief as to your Honorable Court may seem proper.

THE DRAVO CONTRACTING COMPANY,

By WILLIAM S. MOORHEAD,
LAWRENCE D. BLAIR,
W. CHAPMAN REVERCOMB,
W. ELLIOTT NEFFLEN,
Its Solicitors.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the original three-judge court is reported *sub nom. Dravo v. Fox,* in 16 F. Supp. 527. The opinion of this Honorable Court upon the earlier appeal is found at 302 U. S. 134. The opinion of the Circuit Court of Appeals (R. 223) is reported in 114 F. (2d) 242.

Jurisdiction.

The opinion of the Circuit Court of Appeals, reversing the District Court, was entered on September 6, 1940. By order dated December 4, 1940, the time for filing petition for certiorari was extended for a period of ten days from December 6, 1940 (R. 234). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 347).

Questions Presented.

I.

Whether the apportionment, directed by the Circuit Court of Appeals, of the income of petitioner, a foreign corporation, derived from the performance, partly within and partly without the State of West Virginia, of certain contracts with the United States for the construction of locks and dams in navigable rivers, by allocating as income taxable under the statute known as the West Virginia Gross Sales and Income Tax Law, all payments made under said contracts upon events occurring within West Virginia, without regard to the extent to which those payments were derived from or were attributable to activities carried on or engaged in beyond the borders of said state, follows and conforms to the applicable rulings of this Court upon the former appeal in this case.

II.

Whether any part of the tax assessed against petitioner can be sustained in as much as the taxable income of petitioner was not identified or ascertained and the statute involved provides no method of apportionment for the identification or ascertainment thereof.

The Record in the Circuit Court of Appeals.

Before proceeding with the statement of the case, we wish to direct the Court's attention to the situation in regard to the record in the Circuit Court of Appeals.

By stipulation of the parties, it was agreed that the record upon the appeal to the Circuit Court of Appeals should consist of the printed record upon the previous appeal to this Court, together with the depositions, stipulations, pleadings, orders, and various other papers filed in said case since the remand thereof by this Court. It was further stipulated that a Joint Supplement to Briefs, to be printed in said Circuit Court of Appeals, should contain only certain portions of the previous record in this Court and of the record that had subsequently been made, to which the parties desired particularly to direct the Circuit Court of Appeals' attention. References to the printed Joint Supplement in the Circuit Court of Appeals will be designated as "(R. ....)", and references to the former record in this Court will be designated as "(U. S. Sup. Ct. R. ....)".

Statement of the Case.

This is a suit in equity brought in the District Court of the United States for the Southern District of West Virginia by The Dravo Contracting Company as plaintiff, against respondent, as an individual and as State Tax Commissioner of the State of West Virginia for an injunction to restrain the collection of privilege taxes

assessed against your petitioner in the amount (including penalties) of $135,761.51.

The statute under which the assessment was made is known as the Gross Sales and Income Tax Law of the State of West Virginia. Code of West Virginia, 1931, Chapter 11, Article 13, amended effective May 27, 1933, Acts of 1933, Chapter 33 (U. S. Sup. Ct. R. 26). It provides for "annual privilege taxes" on account of "business and other activities", and imposes, upon every person engaged or continuing within said state in the business of contracting, a tax "equal to two per cent (2%) of the gross income of the business". (*id.*)

Your petitioner is a Pennsylvania corporation engaged in the general contracting business. Its principal office and plant are at Pittsburgh, Pennsylvania. It has been qualified to do business in West Virginia for many years (R. 84-85).

Petitioner's plant at Neville Island, Pittsburgh, Pennsylvania, consists of a machine shop, structural and pattern shops, and other facilities for shaping and fabricating steel and equipment of various kinds, as well as repair shops and a warehouse for storage (R. 84). Its main offices are also at Neville Island, Pittsburgh, Pennsylvania (*id.*), including its executive, engineering, drafting, estimating, purchasing, and accounting offices and the offices for the staffs of its various departments.

The income assessed for tax arose out of four contracts between the United States and your petitioner for the construction of roller gate dams and locks in the Kanawha River at Marmet and London, West Virginia, and for the construction of locks in the Kanawha River at Winfield, West Virginia, and in the Ohio River near Gallipolis, Ohio (R. 77 *et seq.*).

All four contracts were entered into by mail between petitioner at Pittsburgh, Pennsylvania, and the representatives of the United States Government at Huntington, West Virginia (R. 79). The Marmet and London

contracts covered the construction of roller gate dams, together with the alterations of or additions to existing locks, and machinery and equipment incidental thereto. Unlike the old stationary dams of solid masonry, roller gate dams consist of large cylindrical steel gates placed between piers or pillars of concrete and hoisted or lowered by machinery operated by electrical power, together with structural steel bridges extending clear across the river with two chords or decks upon which are operated large electrical cranes on tracks (general specifications of London contract, page 1, U. S. Sup. Ct., R. 98).

The following dimensions, prices, and quantities taken from the London contract convey the extent and size of the work involved. Each roller gate dam consisted of five cylindrical gates of steel each 100 feet long and 26 feet in diameter, unit price $66,000 each. The steel service bridge was 565 feet in length with two decks. The unit price of the electrical revolving locomotive crane was $25,000 and of the electric crane unit $7,500. The unit price of the power house machinery was $19,000, of the electric illumination and control equipment $19,800, of the four lock gate operating machines $3,500 each, and of the two gate valves $12,000 each (U. S. Supt. Ct. R. 101).

In the estimate for the London contract alone furnished by the Government, the following quantities of various materials were estimated as required: concrete, 73,300 cubic yards; structural steel, 1,824,000 pounds; reinforcing steel, 492,000 pounds; nickel steel, 368,600 pounds; steel castings, 398,400 pounds; sheet steel piling, 15,600 square feet; as well as substantial though lesser quantities of various other materials (U. S. Sup. Ct. R. 101).

The Winfield and Gallipolis contracts covered twin or parallel locks of the usual type found on inland rivers, together with four steel lock gates, eight lock gate oper-

ating machines with valves and piping for hydraulic operation, and necessary supply lines, as well as power-house machinery and electrical power distribution systems (general specifications, Winfield lock contract, page 1, record, page 573, not appearing in either printed record).

The twin locks at Winfield were 56 feet wide by 360 feet long, with four steel lock gates, unit price $26,000 each. The unit price of the power house machinery was $36,000, of the electric illumination and control equipment $11,000, of the eight gate valves $13,300 each, of the eight lock gate operating machines $4,200 each, and of the piping system $22,000 (*id.*).

In the Government's estimate for the Winfield contract alone, the following quantities of various materials were estimated as required: concrete, 128,400 cubic yards; structural steel, 871,000 pounds; reinforcing steel, 361,000 pounds; various iron and steel castings, 188,000 pounds; 3-inch and 4-inch fibre conduit, 12,800 linear feet, as well as substantial though lesser quantities of various other materials (*id.*).

Each contract required the plaintiff to furnish all labor and materials and to perform all work required for the work described in each contract "for the consideration of the sum based on designations and unit rates specified in the schedule appended" to each contract (U. S. Sup. Ct. R. 62). In other words, these contracts were unit price contracts. The items designated for unit price payments consisted generally of linear, square, cubic, and avoirdupois units of work, together with lump sums for certain units of machinery and equipment, such as roller gates and revolving electric locomotive cranes (see London bid, U. S. Sup. Ct. R. 393).

Each contract provided that partial payments would be made as the work progressed at the end of each calendar month on estimates made and approved by the contracting officer, London contract, Article 16, (U. S. Sup.

Ct. R. 69). In addition, the detailed specifications of each contract provided for the inclusion in the monthly estimates of various percentages of certain unit prices upon certain specified events. Refer Paragraph 4-47 in the detail specifications for the London contract covering measurement and payment for all metal work (U. S. Sup. Ct. R. 157-158).

The events upon which these additional payments were made were (1) purchase of material for fabrication; (2) the fabrication thereof; (3) delivery at the work site; and (4) incorporation in the structure. For example, under the specifications of the Marmet and London contracts, percentage payments of the unit prices for the various parts of the roller gates and appurtenant structures and equipment were provided for (2) upon fabrication; (3) upon delivery at the work site; and (4) upon erection (U. S. Supreme Court, R. page 222). Payments of specified percentages of the unit prices of other metal material were provided for upon (3) delivery at the work site, and (4) incorporation in the structure (*id.* p. 158). None of the contracts as originally drawn provided for any payments upon delivery of material at petitioner's plant. Such provision was made, however, by a change order under the Winfield contract to stimulate production so as to provide immediate employment for shop employees (U. S. Sup. Ct. R. 386 a). Under the Winfield contract as so changed, percentage payments on the unit price of lock gates and of the valves and machinery incidental thereto were made (1) upon delivery of material at the plant; (2) upon fabrication; and (3) upon incorporation in the structure. Similar provision was made in respect of various materials by a typewritten addition to the Gallipolis contract.

In view of the importance attaching to partial payments made (1) upon delivery of materials, and (2) upon fabrication, under the decision of the Circuit Court

of Appeals, we set forth below a list of all items under each of the four contracts in respect of the unit prices of which any such part payments were made, also indicating the percentage of the unit price so paid (see tables, R. 97-98):

	Payment upon Delivery of Materials	Payment upon Fabrication
Marmet Contract		
Roller gates and appurtenances	None	50%
London Contract		
Roller gates and appurtenances	None	50%
Winfield Contract		
Lock gates	30%	30%
Lock gate operating machines	30%	30%
Stoney gate valves	30%	30%
Gallipolis Contract		
Structural Steel and other metals	30%	30%
Tainter gate valves	30%	30%
Lock gate machinery	30%	30%

In respect of no other items were such part payments provided.

Tables of the various items under each of the contracts in respect of which part payments were made upon events other than upon delivery of material or fabrication are contained in the original stipulation (R. 99-100).

The partial payment provisions of the respective contracts, therefore, varied as to (1) the designated items for which they were provided; (2) the events upon which they were to be paid; and (3) the percentage of the unit price to be paid.

All payments under the several contracts were received by petitioner at its office in Pittsburgh, Pennsylvania. None was received by petitioner in West Virginia (R. 82).

The activities of petitioner in the performance of its contracts carried on outside the State of West Virginia are described in paragraph 11 of the original stipulation (R. 87 *et seq.*). They were classified by Mr. J. S. Miller, Vice President of The Dravo Contracting Company, in his deposition, as direct and indirect (R. 121). Fabrication, pattern making, preassembling, shop painting and transportation were classified as direct *(id.)*. These activities were described as direct because they could be charged directly to an item in the contract.

Indirect activities, as classified by Mr. Miller, included estimating and bidding (R. 119), engineering, drafting, purchasing, supervising, accounting, manufacturing of equipment, and renewing, repairing, handling, and warehousing of equipment, materials, and supplies, as well as accounting and printing (R. 121-122). The scope and extent of these indirect activities were described in the depositions of various officers of petitioner (R. 107 *et seq.*).

Respondent, as State Tax Commissioner, assessed petitioner's entire income from the work referred to with taxes in the sum of $135,761.51 (including penalties) for the years 1933 and 1934, as above stated, and demanded payment thereof.

As set forth in more detail in the Petition for Certiorari (*supra*, p. 1 *et seq.*), the collection of the entire tax was originally enjoined; upon appeal to this Court, that decree was reversed and the case was remanded with directions that an apportionment would in any event be necessary to limit the tax to the income from activities carried on in West Virginia; subsequently, by virtue of an apportionment on a cost ratio

basis, the petitioner's tax liability was fixed at $63,214.25 by the District Court (R. 49 *et seq.*); upon appeal to the Circuit Court of Appeals for the Fourth Circuit, that decree was also reversed, and the case was ordered remanded, with directions that the decree to be entered should enjoin the collection of only so much of the taxes in question as were assessed upon payments made upon delivery of materials and upon fabrication thereof at petitioner's plant outside West Virginia (R. 231-232). The resulting tax would amount to $108,814.67.

By order dated December 4, 1940, the time for filing petition for certiorari was extended for a period of ten days from December 6, 1940 (R. 234).

The petition, in support of which this brief is filed, prays that a writ of certiorari issue to review that decision of the Circuit Court of Appeals.

Specification of Errors to be Urged.

I.

The Circuit Court of Appeals erred in directing that an apportionment of petitioner's income should be made upon the basis of the place of occurrance of the activities upon which payments were made.

II.

The Circuit Court of Appeals erred in refusing to enjoin the collection of the entire tax.

Argument.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN DIRECTING THAT AN APPORTIONMENT OF PETITIONER'S INCOME SHOULD BE MADE UPON THE BASIS OF THE PLACE OF OCCURRENCE OF THE ACTIVITIES UPON WHICH PAYMENTS WERE MADE.

The first question presented is the validity of the Circuit Court of Appeals' apportionment of petitioner's receipts or gross income.

The Circuit Court of Appeals concluded as follows (R. 227):

> "With the exception of the deliveries and the fabrication at the Pittsburgh plant, for which partial payments were made, with passage of title to the Government, all of the activities upon which payments were made occurred within the state, and the income derived therefrom was subject to the state's power to tax."

The Circuit Court of Appeals accordingly directed that (R. 231-232)

> "* * * decree should be entered enjoining the collection of only so much of the taxes as were assessed upon the portion of the income of taxpayer derived from payments made upon deliveries or fabrication at its Pittsburgh plant * * *".

The decision of the Circuit Court of Appeals, therefore, holds taxable all petitioner's income derived from payments made *upon* events occurring in West Virginia and exempts only those payments made *upon* events

happening outside the state. The activities for which the payments were made and the place where they were carried on, are disregarded.

That decision is, we submit, in direct conflict with the decision of this Honorable Court upon the former appeal in this case, as well as other applicable decisions of this Court, in that said decision would subject to the tax work expressly held by this Court to be beyond the state's taxing jurisdiction.

Upon the former appeal in this case, *James v. The Dravo Contracting Company,* 302 U. S. 134, this Court, in the majority opinion delivered by Mr. Chief Justice Hughes, said (p. 135):

> "The questions presented are (1) whether the state had territorial jurisdiction to impose the tax * * *
>
> "*First*—as to territorial jurisdiction—Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax. Hans Rees' Sons v. North Carolina, 283 U. S. 123, 133, 134; Shaffer v. Carter, 252 U. S. 37, 57; Surplus Trading Co. v. Cook, 281 U. S. 647."

That decision settles (1) that West Virginia's jurisdiction to impose the tax was governed by the place where the activities were carried on; and (2) by implication, that the state's jurisdiction to tax the gross income from activities was no greater that its jurisdiction to tax the activities from which said gross income was derived. In other words, in so far as the tax was imposed upon receipts in other states for work done in other states, it was conceded to be outside of the taxing power of the statute: *Ford Motor Co. v. Beauchamp,* 308 U. S. 331.

This Court, in its earlier opinion in this case, then proceeds (p. 135):

> "A large part of respondent's work was performed at its plant at Pittsburgh. The stipulation of facts shows that respondent purchased outside the State of West Virginia materials used in the manufacture of the roller gates, lock gates, cranes, substructure racks and spur rims, structural steel, patterns, and hoisting mechanism and equipment, under each of its contracts and fabricated the same at its Pittsburgh plant * * *."
>
> "It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the installation at the respective sites within that state and an apportionment would in any event be necessary to limit the tax accordingly. Hans Rees' Sons v. North Carolina, supra."

Here the Court again speaks in terms of "work" and "activities". The receipts or gross income therefrom unquestionably come under the same limitation. This Court has, therefore, expressly ruled in this very case that the work involved and the activities carried on outside West Virginia in fabricating the roller gates, lock gates, cranes, substructures, structural steel, patterns, and hoisting mechanism, and, consequently, the receipts or gross income derived therefrom, were beyond the state's taxing power. An apportionment was consequently held necessary.

The use of the word "accordingly" specified the kind of apportionment required. The kind of apportionment required was one that would limit the tax to the income

from activities at the dam sites and would exclude the income from activities carried on outside the state.

The apportionment adopted by the Circuit Court of Appeals, however, fails to limit the tax in accordance with the directions of this Court. It subjects to the tax the income, in some instances, the whole, in other instances, a part, derived from the very work expressly held exempt by this Court.

INCOME HELD EXEMPT BY THIS COURT, TAXED 100% BY THE DECISION OF THE CIRCUIT COURT OF APPEALS.

First, let us consider the items specifically mentioned as exempt in the opinion of this Court, the entire income from which would be subjected to the tax as a result of the decision of the Circuit Court of Appeals. Structural steel is a striking example of such an item. Structural steel was one of the items designated for unit price payments under all of the contracts. The unit price thereof covered not only the necessary material, but also all work required in the placing or installation thereof. See general specifications of the London contract (U. S. Supreme Court R. 158). Large quantities of this material were used in the performance of the contracts. The amount estimated as required for the London contract was 1,824,000 pounds (U. S. Sup. Ct. R. 101). Under three of the four contracts, no part payments were made either upon delivery or fabrication in respect of structural steel. See table of items in respect of which such part payments were made under the Marmet, London, and Winfield contracts (R. 97-98). It follows that, under the decision of the Circuit Court of Appeals, all income derived from the unit prices for structural steel under those three contracts would be subjected to the tax. Consequently the entire income

attributable to the purchase and fabrication of structural steel under those three contracts would be taxed under the decision of the Circuit Court of Appeals. The income attributable to the purchase and fabrication of structural steel was, however, upon the former appeal, by this Court held to be beyond the taxing power of the state. The conflict between the decision of the Circuit Court of Appeals and the former decision of this Court in respect of structural steel is manifest.

The same situation obtains in respect of lock gates and cranes under the Marmet and London contracts and in respect of patterns under the Marmet, London, and Winfield contracts. The tables above referred to show that no part payments were made upon delivery at plant or fabrication in respect of any of these further items specifically mentioned in this Court's opinion. The entire unit prices of these items, and consequently the entire income attributable to the fabrication thereof, would, therefore, be taxed under the Circuit Court's decision, in conflict with the express ruling of this Court.

INCOME HELD EXEMPT BY THIS COURT, PARTIALLY TAXED BY THE DECISION OF THE CIRCUIT COURT OF APPEALS.

Next, let us consider the items specifically mentioned in the opinion of this Court, a portion of the income from which is taxed under the decision of the Circuit Court of Appeals. In respect of those items part payments were made upon delivery at plant or upon fabrication. The part payments so made were excluded from taxable income by the decision of the Circuit Court of Appeals. In respect of this class of items, therefore, the entire income attributable to fabrication would not be subjected to the tax. The following facts contained in the record show, however, that a portion of that

income would be subjected to the tax, contrary to the earlier ruling of this Court.

First, let us consider roller gates and appurtenant structures under the Marmet and London contracts. The record discloses that at least 80% of said unit price of roller gates represented income attributable to exempt activities. Mr. J. S. Miller, Vice President of The Dravo Contracting Company and executive head of its contracting division, testified as follows (R. 125-127):

"Q. Mr. Miller, it has appeared that certain partial payments were provided for in the contracts, being based on a percentage of the particular unit price to which they were applicable, is that correct?

A. Yes.

* * * * * *

(R. 126)

"Q. Mr. Miller, what if any relation was there between these percentage part payments and the value of the article at the time of the event upon which the partial payment was dependent?

A. There was absolutely no relation between the partial payment and the actual value. The percentages were fixed arbitrarily. As a matter of fact, it was simply following a precedent established many, many years ago, when fabrication consisted of fabrication in small pieces. In those days the cost of erection in the field was very high compared with what it is today. Today in a modern shop we make this stuff in large pieces, as large as can be transported, and then in the field the erection is very simple.

Q. Mr. Miller, does the percentage payment provided for in respect of roller gates and in

respect of other metal materials in these contracts upon fabrication fairly represent the value of the article as fabricated or as delivered?

A. No, it does not. There they followed very closely the sixty-forty, and there again the roller gates must be pre-assembled here, prefitted, and it goes down in as big pieces as possible.

Q. Is the value greater or less than the percentage of the unit price prescribed upon fabrication or delivery?

A. The value is much greater than the sixty or sixty-five—Sixty per cent, is it?

Q. Yes, sir, sixty and sixty-five.

A. —allowed.

Q. How then does the final payment of thirty-five or forty per cent compare with the cost or value of erecting in the field?

A. Is it much greater than the cost of erection in the field; that is, the payment is much greater."

* * * * * *

(R. 127)

"Q. There is one more question in connection with the relationship between final part payments and cost of erection. What is the average cost of erection or installation at the work site of fabricated material?

A. I would say between fifteen and twenty per cent. It will vary in some items; it will vary with the items."

The testimony quoted establishes that the income attributable to installation activities would not exceed 20% of the unit price of the fabricated items. This testimony was unchallenged. It is corroborated by the stipulated facts. The activities in West Virginia consisted of the mere installation at the dam site. On the

other hand, the activities outside West Virginia in respect of fabricated items consisted of fabrication, pattern making, shop painting, storage and transportation, as well as estimating, designing, drafting, purchasing, supervising, accounting, etc. It follows that at least 80% of the unit prices of fabricated items is attributable to non-taxable activities carried on outside the state.

On the other hand only 50% of the unit price of roller gates was paid upon fabrication (R. 97). Therefore, only that percentage would be excluded from the income assessed for tax under the Circuit Court's decision. It is, therefore, indisputable that 30% of the income derived from the fabrication of roller gates would be subjected to the tax, in direct conflict with the former decision of this court.

All other work mentioned by the Supreme Court, in respect of which part payments were made upon delivery or fabrication, is in the same category as the roller gates. Such other work consists of lock gates under the Winfield contract only (see tabulation of items under that contract, R. 98); and structural steel under the Gallipolis contract (see similar tabulation, *id.*). The only difference is the size of the percentage of exempt work taxed. In connection with all such items other than roller gates, the payment made upon events occurring within West Virginia was 40%, instead of 50%, of the unit prices. Refer tables (R. 97-100) The testimony above referred to, showing that no more than 20% of the unit prices of fabricated items was attributable to West Virginia activities, applies equally to these other items. In respect of these items the decision of the Circuit Court of Appeals, therefore subjects to the tax, in conflict with this Court's decision, 20% of the unit prices of said items derived from out-of-state activities.

OTHER ITEMS IN ALL RESPECTS SIMILAR TO THE ITEMS HELD EXEMPT BY THIS COURT.

Thus far, we have considered only the particular items of work expressly referred to in the earlier opinion of this Court, namely, roller gates, lock gates, structural steel, etc. We believe, however, that the mention of those items by this Court was not intended as an exclusive classification. We believe that the items mentioned were mere examples of the work of fabrication. If that be correct, other items involving similar activities outside West Virginia are likewise beyond the state's taxing jurisdiction.

That there were many other such fabricated items in addition to those expressly mentioned in the opinion of this Court is indisputable. In respect of some, such as the various metal items under the Gallipolis contract (refer table R. 98), part payments were made upon delivery of materials and upon fabrication. In the case of those items, as in the case of items discussed above, upon which similar payments were made, the income from activities, held exempt by this Court, but subjected to the tax by the decision of the Circuit Court of Appeals, amounted to 20% of the unit price of the items.

In respect of other fabricated items, not mentioned by this Court, no part payments were made upon events occurring outside West Virginia. All fabricated items under the four contracts, other than those hereinbefore referred to, are included in this category. As in the case of similar items discussed above, at least 80% of the unit prices for this work was attributable to activities outside the taxing state. Yet because no payments were made in respect of the unit prices for this work upon events occurring outside West Virginia, the entire income derived from fabrication, amounting to at least 80% of the unit prices for the completed work, is held to be subject to the tax. A tabulation of items in this class, upon which

partial payments were made upon delivery at the work site under each of the contracts, appears in the original stipulation (R. 99-100). Examples of still another class of fabricated items, in respect of which no part payments whatsoever were made, are the Locomotive Cranes and Bridge Crane Units under the roller gate dam contracts (see items 33 and 34 of Appendix AA, R. 176). We submit that the tax upon other work similar in all respects to the work particularly mentioned by this Court in its opinion, is as much in conflict with that opinion as the tax upon the work expressly mentioned.

From the foregoing, it is clear that, as to all fabricated items under the four contracts in respect of which no part payments were made upon activities occurring outside West Virginia, the decision of the Circuit Court of Appeals taxes the income attributable to fabrication 100%, and that, as to the few items in respect of which such part payments were made, said decision taxes approximately 25% of the income attributable to fabrication activities (20% of the entire unit price of the work) notwithstanding the express ruling of this Court to the contrary.

The total amounts of petitioner's receipts thus subjected to the tax, contrary to the rulings of this Court, are not identified. The figures necessary for that purpose cannot be ascertained. If they could, it would be easy to apportion the tax in this case. Using, however, the average percentage figures arrived at as above set forth for the various classes of items, and using, in addition, the unit price figures contained in the part payment tabulations already referred to (R. 97-100), some approximation of the wrongfully taxed income for the particular items covered by the figures used, can be arrived at, as follows:

First classification—work for which part payments outside West Virginia were made (from tables, R. 97-98):

Contract	Item	Total Unit Prices	Per cent Wrongfully Taxed	Amount Wrongfully Taxed
Marmet	Roller gates, etc.	$291,920.00	30	$ 87,576.00
London	Roller gates, etc.	329,000.00	30	98,700.00
Winfield	Lock gates	244,000.00	20	48,800.00
Gallipolis	Various items	348,949.07	20	69,789.81
				$304,865.81

Second classification—work for which no part payments outside West Virginia were made (from tables, R. 99-100):

Contract	Item	Total Unit Prices	Per cent Wrongfully Taxed	Amount Wrongfully Taxed
Marmet	Various metals	$145,630.32	80	$116,504.26
London	Various metals and machinery	225,022.99	80	180,018.39
Winfield	Various metals and machinery	135,343.82	80	108,275.06
Gallipolis	Pipe, etc.	4,902.02	80	3,921.61
				$408,719.32

It thus appears that income amounting to a minimum of over $700,000, derived from exempt activities, is subjected to the tax by the decision of the Circuit Court of Appeals. And the figures mentioned are derived only from items in respect of which some kind of part payments were made. Only those items were covered by the tabulations in the record used in arriving at the above figures. The undisputed testimony was, however, that direct out-of-state activities entered into an almost equal number of items designated for unit price payments, in respect of which no part payments were made. Refer deposition of H. L. Hood (R. 172) and Appendix CC (R. 181) and Appendix AA (R. 176).

The percentage of the respective unit prices attributable to those out-of-state activities was not ascertained, and, therefore, does not appear. It is, consequently, impossible even to approximate their total.

Under the circumstances shown, we respectfully submit that the conflict between the decision of the Circuit Court of Appeals and the former opinion of this Court is not only probable, but actual and direct.

FAILURE OF THE CIRCUIT COURT OF APPEALS TO FOLLOW THE FORMER OPINION OF THIS COURT IN THIS CASE.

Moreover, the explanation of this conflict is evident when the basis of the Circuit Court's decision is considered. The following quotation appears to embody the conclusions controlling the Circuit Court of Appeals' decision (R. 227):

> "With the exception of the deliveries and the fabrication at the Pittsburgh plant, for which partial payments were made, with passage of title to the Government, all of the activities upon which payments were made occurred within the state, and the income derived therefrom was subject to the state's power to tax."

As we read the above language, it means that the fact that the payments were made *upon* activities carried on within the state subjects those payments to the state's taxing power, regardless of the extent to which they represent income derived from activities carried on beyond the borders of the state. In other words, according to the Circuit Court of Appeals, the controlling factor is the place where the event occurred *upon* which a payment is made.

The former opinion of this Court, however, lays down an entirely different rule. This Court said (*James v. Dravo,* 302 U. S. 134-135):

> "Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax."

The principle stated has, moreover, been translated into terms of receipts as distinguished from activities, by this Court itself in the later case of *Ford Motor Co. v. Beauchamp,* 308 U. S. 331, 337, as follows:

> "James v. Dravo Contracting Company contains nothing contrary to this view. The statute under consideration there levied a 'privilege tax equal to two per cent of the gross income of the business'. Insofar as it was upon receipts in other states for work done in other states, it was conceded to be outside of the taxing power of the statute."

According to the decision of this Court, therefore, the controlling factor is the place where the activity was carried on *for* which the payment was made.

This Court directed, therefore, that any apportionment that might legally be made would have to limit the tax so as to exclude any tax upon income derived from activities carried on outside the State, whereas the decision of the Circuit Court of Appeals has adopted an entirely different limitation, namely, one in which the controlling factor is the place of the occurrence of the event upon which the payments were made. The taxation of much of Petitioner's income derived from out-of-state activities, in direct conflict with the earlier ruling of this Court, as previously shown, results from this failure of the Circuit Court of Appeals to abide by this Court's former opinion.

SOME OTHER IMPLICATIONS OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The decision of the Circuit Court of Appeals would, moreover, have some other very extraordinary implications. Assume, for example, that no payments had been provided for in any of the contracts, upon events occurring outside the taxing state. In that event, the entire income would have been taxable, although the activities from which it was derived, were carried on exactly as under the present contracts.

Or, on the other hand, let us assume that the entire income had been payable upon some event occurring outside the State. Would West Virginia agree, that, under those circumstances, no tax would be collectible?

Another peculiar result flowing from the decision of the Circuit Court of Appeals is the lack of uniformity that would obtain. Thus the income derived from the fabrication of structural steel under the Marmet, London and Winfield contracts would be taxed 100% because no partial payments were made upon events occurring outside the state, in respect of the unit prices of structural steel under those contracts. But payments of the kind in question were provided for and made in respect of structural steel under the Gallipolis contract. Exactly the same activities under the different contracts would, therefore, be taxed in a different measure under the rule established by the Circuit Court of Appeals.

Again, let us assume that the income from activities engaged in entirely outside West Virginia was ascertained and identified, yet was payable only upon the happening of a certain event within the state. No one would assert that such income was within the state's taxing power. We submit that the fact that the income

from those out-of state activities was not identified, cannot extend the taxing jurisdiction of the state beyond the limits that would otherwise prevail. On the contrary the fact that the income from those activities was not identified calls for some *method* of apportionment.

Finally, let us assume that the Legislature had contemplated that the business of contracting might be conducted partly within and partly without the state. Let us further assume that the Legislature had provided that, in such cases, the income of the business should be apportioned upon the basis adopted by Circuit Court of Appeals, namely upon the basis of the payments made upon events occurring within the state. It is clear that petitioner would have been entitled to show that that method of apportionment worked unfairly in petitioner's case: *Hans Rees' Sons v. North Carolina,* 283 U. S. 123.

As a matter of fact, something very similar to that occurred in this case. Upon the earlier remand of this case and prior to any further proceedings in the District Court, petitioner was apprised of respondent's contention that the partial payments in question formed a basis for apportionment. Petitioner accordingly took the depositions of its officers, hereinabove referred to, showing that such an apportionment does not work fairly in this case.

These illogical implications of the Circuit Court's decision strengthen the conclusion that the Circuit Court must have erred.

OTHER ERRORS IN THE OPINION OF THE CIRCUIT COURT OF APPEALS.

Exception is also taken to the conclusion of said Circuit Court of Appeals that this Court had heretofore "sustained the tax". The opinion of said court says (R. 227):

> "The fact that the Supreme Court sustained the tax, although the point was expressly raised in the record that it was invalid because imposed on income derived partly from out-of-state activities, with no provision for apportionment, is conclusive, we think, not only as to its validity, but also as to the fact that no such method of apportionment was contemplated."

On the contrary, we submit that this Court, in holding that an apportionment properly limiting the tax to taxable activities "would in any event be necessary", decided that no portion of the tax could be sustained as valid unless and until such an apportionment had lawfully been made.

Exception is also taken to the conclusion of the Circuit Court of Appeals that this Court "directed an apportionment" (R. 227). On the contrary, we submit that the question of whether an apportionment could be made was left to the lower court for decision in the further proceedings directed in the mandate of this Court.

Finally, the Circuit Court of Appeals say (R. 230):

> "* * * the power to tax income derived from contracting within the state is not affected by the fact that materials for use under the contract may be brought from without the state, or

that they may have been prepared by the contractor without the state for use under the contract. Only where income arising from a contract performed within the state accrues upon a separable out-of-state transaction should it be excluded, as not being income arising from contracting within the state."

The same idea is differently expressed in another part of the opinion ([redacted] A. R. [redacted]) : 229

> "The fact that the contractor may have prepared materials in other states for use in the contract is immaterial, if they were used in the performance of the contract in West Virginia and payments made the contractor were dependent upon such use."

This was substantially the argument of the present respondent upon his former appeal to this Court. In his original brief, the first and main question was stated as follows (see original brief on behalf of Fred L. Fox, Appellant, page 20) :

> "The contracts here involved clearly contemplate the local construction of locks and dams, and such work as may have been done outside of West Virginia in preparation therefor and such interstate transportation as may have occurred is purely incidental to said construction of the locks and dams."

The language of this Court overruling said contention is equally applicable to the above quoted language of the Circuit Court of Appeals (*James v. Dravo,* 302 U. S. 134, 135) :

> "Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to

impose the tax. Hans Rees' Sons v. North Carolina, 283 U. S. 123, 133, 134."

Equally applicable is the following language from the *Hans Rees* case referred to in the foregoing quotation: *Hans Rees' Sons v. North Carolina,* 283 U. S. 123, 133:

> "But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one State regardless of the extent to which it may be derived from the conduct of the enterprise in another State."

The conclusion of the Circuit Court of Appeals that the activities of petitioner in preparing materials in other states for use under the contracts, are immaterial, is, therefore, definitely in conflict with the decisions of this Court.

We, therefore, respectfully submit that the Circuit Court of Appeals erred in directing an apportionment based upon the place of occurrence of the activities upon which payments were made.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO ENJOIN THE COLLECTION OF THE ENTIRE TAX.

The second question presented is: Can any apportionment be made?

We assume, for the purpose of this discussion, that we have demonstrated that the apportionment of petitioner's income, directed by the Circuit Court of Appeals, and based on payments made upon delivery of material or upon fabrication at petitioner's Pittsburgh plant, cannot be sustained. We have shown that as to the particular items in respect of which such part payments were made, an apportionment of the final payment, made upon incorporation of the materials or equipment in the structure, would be necessary to limit the tax to income derived from activities in West Virginia (*supra,* p. 18 *et seq.*).

Moreover, an apportionment based upon all percentage payments made, including those made upon delivery at the work site, would be open to the same objection. All items in respect of which percentage payments were made were fabricated items (see table, R. 97-100), and according to the undisputed testimony, the income from fabrication represented at least 80% of the unit price of each item of that kind (*supra,* p. 23). On the other hand, the aggregate of all percentage payments, exclusive of the final payment, was 60% of the unit price of any item (65% in the case of roller gates only) (see tables, R. 97-100). It is therefore manifest that an apportionment would be necessary in respect of all final payments to limit the tax as directed.

Nor would an apportionment, excluding from taxation all unit prices in respect of which any part pay-

ments were made, limit the tax to income derived from activities in West Virginia, because there were many fabricated items in respect of which no part payments at all were made. Examples of such items are the locomotive cranes and bridge crane units used in the roller gate dams. In respect of these items no part payments whatsoever were made (see items 33 and 34 of Appendix AA, R. 176). Yet these cranes were specifically mentioned as exempt from the tax in the former opinion of this Court. In the same category were various other assemblies of machinery and equipment (see tables, R. 97-100). In fact, the testimony in this case is undisputed that fabrication and other direct activities outside West Virginia were involved in the very large majority of all items designated for unit price payments under the contracts. Appendix CC (R. 181); and depositions of H. L. Hood (R. 172).

Further, every unit price represented, in some measure, income from out-of-state activities. None of the items designated for unit price payments comprised work entirely within West Virginia. Indirect activities outside West Virginia, such as estimating, bidding, designing, drafting, supervising, purchasing, accounting, etc., were involved in every item designated for unit price payments. This resulted from the type of items designated. The instructions of the Invitation for Bids, therefore, provided (U. S. Sup. Ct. R. 80):

> "The unit price bid for each item must allow for all collateral or indirect cost connected with it."

These instructions were followed and the cost of all activities not directly attributable to an item were spread over all the items *pro rata*: deposition of J. S. Miller (R. 120). Mr. Miller therefore testified (R. 123):

"A. Payments for those activities were included in each and every one of the unit prices under which payments were made."

Inasmuch as income from activities outside the taxing state, was included in every unit price paid, an apportionment of every unit price paid would be necessary to limit the tax to income from activities within West Virginia. Petitioner's income is not capable, therefore, of a separation, division, or apportionment so as to reflect the income from activities within and without the state, respectively, or so as to limit the tax in the manner previously directed by this Court, unless some artificial or arbitrary method of apportionment is available.

No arbitrary or artificial method of apportionment is available, however, under the statute involved in this case. The Circuit Court of Appeals, after full consideration of this question, said (R. 227):

> "If, therefore, any such apportionment as was made by the court below were necessary to separate the portion of the income which the state has jurisdiction to tax from the remainder, the tax would unquestionably be void in its entirety."

We therefore respectfully submit that the Circuit Court of Appeals erred in refusing to enjoin the collection of the entire tax against petitioner.

CONCLUSION.

We submit in conclusion that the decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court and, if permitted to stand, will result in depriving your petitioner of its property without due process of law to such an extent as to call for the exercise of this Court's power of supervision.

Respectfully submitted,

WM. S. MOORHEAD,
LAWRENCE D. BLAIR,
W. CHAPMAN REVERCOMB,
W. ELLIOTT NEFFLEN,
Solicitors for The Dravo Contracting Company, Petitioner.

IN THE

Supreme Court of the United States

NO. 622 OCTOBER TERM, 1940.

THE DRAVO CONTRACTING COMPANY,
a Corporation, Petitioner,

v.

ERNEST K. JAMES, as an Individual and as State Tax Commissioner of the State of West Virginia,
Respondent.

PETITION FOR REHEARING UPON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

WM. S. MOORHEAD,
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W. CHAPMAN REVERCOMB,
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IN THE

Supreme Court of the United States

NO. 622 OCTOBER TERM, 1940.

THE DRAVO CONTRACTING COMPANY,
a Corporation, Petitioner,

v.

ERNEST K. JAMES, as an Individual and as State Tax Commissioner of the State of West Virginia,
Respondent.

PETITION FOR REHEARING.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of THE DRAVO CONTRACTING COMPANY, a corporation, petitioner in the above entitled case, respectfully represents, as follows:

FIRST: This case comes before your Honorable Court upon a petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

SECOND: The petition for certiorari was filed on December 12th, 1940. On Monday, January 13th, 1941, your Honorable Court denied the petition for writ of Certiorari.

THIRD: The question involved is the validity of the decision of the Circuit Court of Appeals subjecting to the West Virginia Gross Income Tax the gross income of your petitioner received outside West Virginia derived from work performed entirely outside said State.

FOURTH: Your petitioner is convinced that its petition for certiorari failed to make clear that the decision of the Circuit Court of Appeals taxes such extra state income.

FIFTH: The subject matter of the tax under the West Virginia Gross Income Tax Law is the "business and other activities" of the taxpayer. The particular clause here involved imposes the tax upon persons engaging or continuing *within the state* in the business of contracting. The tax is "equal to two per cent. of the gross income of the business." (R. 1-2)

SIXTH: The item of roller gates for the Roller Gate Dams, furnishes an example of the result complained of. Petitioner purchased outside of West Virginia the materials used in the manufacture of roller gates and fabricated same at its Pittsburgh Plant. The roller gates and appurtenant equipment were preassembled at petitioner's shops at Pittsburgh, and were there inspected and tested by Officers of the United States Government. The materials and equipment so fabricated at Pittsburgh were there stored until time for delivery. The United States knew at the time the contracts were made that the above described work was to be performed at petitioner's main plant. The partial payments provided for upon fabrication of the roller gates were made. The contracts provided that title should pass to the Government when the partial payments were made. The roller gates became the sole property of the Government while they were still in Pennsylvania and before they ever entered West Virginia. (R. 2, 3)

SEVENTH: Separate lump sum unit prices for roller gates and appurtenant equipment were, moreover, provided for in the contracts. (R. 97) Although said unit

price included payment for installation at the dam sites, the record indisputably establishes that 80% to 85% of the unit price is attributable to purchase of material and fabrication outside West Virgina. (R. 125-127) Only 50% of said unit price, however, was paid upon fabrication. Payment of the remaining 30% to 35% was deferred until delivery or installation.

EIGHTH: All payments of said unit price for roller gates, regardless of when they were made, were received by petitioner at its office in Pennsylvania. (R. 82) None was received by petitioner in West Virginia. The fabrication of roller gates and the transfer of title thereto to the United States Government was, therefore, a separable transaction completed entirely outside West Virginia.

NINTH: Upon the earlier appeal in this case this Court said: *James v. Dravo Contracting Co.*, 302 U. S. 134, 135 (R. 3);

> "It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania".

TENTH: The Opinion of the Circuit Court of Appeals concedes that where income arising from a contract performed within the state accrues upon a separable out-of-state transaction, it should be excluded as not being income arising from contracting within the state. (R. 230)

ELEVENTH: Nevertheless the 30% to 35% of the unit price of roller gates derived from the fabrication thereof, the payment of which was deferred, is subjected to tax by the decision of the Circuit Court of Appeals, which exempts only the 50% paid upon fabrication.

TWELFTH: It is submitted that the rule requiring the exemption of the income derived from the work above described requires the exemption of not merely a part of the income, but of the entire income derived from this work. The mandate of the Circuit Court of Appeals should be modified so as to exempt, at least, the balance of the income from such work.

THIRTEENTH: The item of roller gates is merely an example of a number of other items in exactly the same category.

FOURTEENTH: The location of extensive construcstruction work in West Virginia for which contracts have actually been entered into under the Defense Program emphasizes the importance of the questions involved in this proceeding. Under the decision of the Circuit Court of Appeals much of said work may be subject to taxation by two or more states.

WHEREFORE, your petitioner respectfully prays that it be granted a rehearing and a reconsideration of its Petition for Certiorari in the above entitled case.

THE DRAVO CONTRACTING COMPANY

By WM. H. FOWLER.

State of Pennsylvania }
County of Allegheny } ss.:

Before me, the undersigned authority, a Notary Public in and for said State and County, personally appeared Wm. H. Fowler, who, being duly sworn according to law, deposes and says that he is Vice-President of THE DRAVO CONTRACTING COMPANY, petitioner in the above entitled case; and deponent further says that the statements contained in the foregoing Petition for a Rehearing are true and correct, insofar as they are within petitioner's knowledge, and insofar as they are based upon information received from others, deponent believes said statements to be true and correct, having received said information from reliable sources.

WM. H. FOWLER.

Sworn to and subscribed before me this 5th day of February, 1941.

FRANK J. STRITZINGER,
[SEAL] *Notary Public.*

My commission expires February 27, 1941.

Certificate.

We, Wm. S. Moorhead, Lawrence D. Blair, W. Chapman Revercomb and W. Elliott Neffen, Counsel for petitioner in the above entitled case, do hereby certify that the foregoing Petition is presented in good faith and not for delay.

By LAWRENCE D. BLAIR,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 622

THE DRAVO CONTRACTING COMPANY, a corporation, *Petitioner,*

v.

ERNEST K. JAMES, as an individual and as State Tax Commissioner of the State of West Virginia, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Foreword	2
Statement of the Case	2
Statement of Facts	3
Petitioner's Specification of Errors	5
Summary of Argument	6
The Decision of the Circuit Court of Appeals Is In Strict Accordance With the Decision of this Honorable Court Upon the Former Appeal And In Nowise Conflicts With Other Applicable Decisions of this Court	6
Argument	6
The Decision of the Circuit Court of Appeals Is In Strict Accordance With the Decision of this Honorable Court Upon the Former Appeal	6
The Taxable Activity	9
Recent Decisions of this Court	13
Refusal to Enjoin the Collection of the Entire Tax	14
Conclusion	15

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Code of West Virginia, 1931, Chapter 11, Article 13, as amended by Acts of 1933, Chapter 33 ---------- 3

IN THE

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RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 223) is reported in 114 F. (2d) 242.

JURISDICTION

While Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347), would, as a discretionary matter, empower this Court to issue the writ as prayed for, we respectfully submit that no question is here presented calling for the issuance thereof.

FOREWORD

This Court being familiar with the procedural and factual matters surrounding this case (*James* v. *Dravo*, 302 U. S. 134), only such statements pertaining to the case and the facts as directly bear upon the questions presented will be included in this brief.

STATEMENT OF THE CASE

This case originating in the United States District Court for the Southern District of West Virginia was appealed to this Honorable Court from a decision restraining the Tax Commissioner of West Virginia from collecting any of the taxes involved. This Court reversed and remanded the cause to the District Court for proceedings in conformity with its written opinion (*James* v. *Dravo*, 302 U. S. 134).

The District Court, in its view not having sufficient evidence before it, ordered the taking of additional testimony. Petitioner then filed a motion for an injunction to prevent collection of any of the tax involved, and a three-Judge Court was assembled for the purpose of hearing said motion. After hearing, this application was denied on the grounds that all constitutional questions had been settled by this Court's opinion (R. 48). The District Court then made a purported allocation of the tax using as a basis the ratio which the cost incurred by petitioner inside West Virginia bore to the total cost and applied that ratio to the total gross income received by petitioner to fix the taxable income within West Virginia. This necessitated additional facts which were stipulated, all of which appear in the decree of the District Court (R. 49-74).

Both parties appealed to the United States Circuit Court of Appeals for the Fourth Circuit, which Court

reversed the decree of the District Court, and remanded the cause with directions that the decree to be entered should enjoin the collection of only so much of the tax as might be applicable with respect to payments made upon delivery of materials and upon fabrication thereof at petitioner's plant outside West Virginia (R. 223-232; *Dravo Contracting Company* v. *James*, 114 F. [2d] 242). It is as to this judgment of the Circuit Court of Appeals that petitioner seeks the issuance of a writ of certiorari.

STATEMENT OF FACTS

The sole question before the District Court was that of allocating the tax in accordance with the former opinion of this Court (*James* v. *Dravo*, 302 U. S. 134). The material facts were settled by this Court in its former opinion. Additional evidence was afterward taken in the District Court (R. 107-220), but such was only an elaboration and to us a useless minute detailment of facts already in the record and recognized by this Court.

Petitioner is a Pennsylvania corporation with its principal office and plant at Pittsburgh in that State, and is admitted to do business in West Virginia. During the years 1932-1933 it entered into four contracts with the Federal Government for the erection of certain locks and dams on and along the Kanawha River and certain locks on and along the Ohio River, all within the territorial limits of West Virginia. The gross sales and income tax law of West Virginia provides for annual privilege taxes on account of business and other activities, the particular clause here in question being as follows: "upon every person engaged or continuing within this State in the business of contracting, the tax shall be equal to two per cent of the gross income of the business". (Code of West Virginia, 1931, Chapter 11, Article 13, as amended by Acts of 1933, Chapter 33.) Prior to May 27, 1933, the tax was three-tenths of one per cent (R. 23-48).

A substantial part of the work performed under these contracts took place at petitioner's plant at Pittsburgh. Petitioner purchased outside the State of West Virginia materials used in the manufacture of the roller gates, lock gates, cranes, substructure racks and spur rims, structural steel, patterns, hoisting mechanism and equipment under each of its contracts and fabricated the same at its Pittsburgh plant. The roller gates and the appurtenant equipment were preassembled at petitioner's shops at Pittsburgh, and were there inspected and tested by officers of the United States Government. The materials and equipment fabricated at Pittsburgh were there stored until time for delivery and the appropriate units as prepared for shipment were then transported by petitioner to the designated sites in West Virginia, and there installed. The United States knew at the time the contracts were made that the above described work was to be performed at petitioner's plant in Pittsburgh. The contracts provided for partial payments as the work progressed and that all such material and work covered by the partial payments should thereupon become "the sole property of the Government." Payments by the Government were made from time to time accordingly. Petitioner knew from the contracts and the invitations to bid as to these payments, the amounts thereof, the time when they would be made and the purposes for which made. See *James* v. *Dravo*, 302 U. S. 134, 139. The payments made for the work just mentioned is that with respect to which the Circuit Court, in full compliance, we believe, with this Court's opinion, declared to be exempt from taxation (R. 223-232). The payments just mentioned, as well as other payments made upon delivery at the work site and incorporation in the structures in West Virginia in strict accordance with the contracts, are set forth in detail in the deposition of C. A. Hill (R. 176-179). The original stipulation of facts specifically

states that the partial payments made by the United States with respect to said materials delivered and work done at Pittsburgh were made for the materials and for the manufactured or fabricated articles (R. 97). Title passed upon such payments.

In the District Court, petitioner produced evidence to the effect that the partial payments did not cover the cost of the particular activity or operation with respect especially to fabrication at Pittsburgh. Furthermore, that the partial payments made with respect to delivery of materials at the work site and the incorporation of fabricated and unfabricated materials into the structures did not correspond to the cost of operations at those particular places, exceeding the same. It is apparent, however, that the partial payments were not meant to cover costs, but were made with respect to the value the Government placed upon the particular operation or activity involved (R. 137-140). At all events, the partial payments which were made for certain specified operations or performances at Pittsburgh and at the dam site were those which petitioner solemnly, in its contract with the Government, agreed to take therefor.

PETITIONER'S SPECIFICATION OF ERRORS

Petitioner specifies that the Circuit Court of Appeals erred in the following particulars:

I

In directing that an apportionment of petitioner's income should be made on the basis of the place of occurrence of the activities upon which payments were made.

II

In refusing to enjoin the collection of the entire tax.

SUMMARY OF ARGUMENT

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN STRICT ACCORDANCE WITH THE DECISION OF THIS HONORABLE COURT UPON THE FORMER APPEAL AND IN NOWISE CONFLICTS WITH OTHER APPLICABLE DECISIONS OF THIS COURT.

James v. *Dravo*, 302 U. S. 134;

Dravo v. *James*, 114 F. (2d) 242;

Western Livestock v. *Bureau of Revenue*, 303 U. S. 250;

American Manufacturing Company v. *St. Louis*, 250 U. S. 459;

Equitable Life Assurance Society v. *Pennsylvania*, 238 U. S. 143;

McGoldrick v. *Berwind-White*, 309 U. S. 33;

Graybar Electric Company v. *Curry*, 238 Ala. 116, 189 So. 186; 308 U. S. 513.

ARGUMENT

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN STRICT ACCORDANCE WITH THE DECISION OF THIS HONORABLE COURT UPON THE FORMER APPEAL.

The question here involved relates solely to territorial jurisdiction to tax. This Honorable Court has already dealt squarely with that problem, and has succinctly and clearly provided its solution (*James* v. *Dravo*, 302 U. S. 134). After this Court's former decision the

matter of apportionment became purely one of little more than mathematical calculation. The Circuit Court of Appeals had no seeming difficulty in following the direction of this Court in making the apportionment. In *James* v. *Dravo*, 302 U. S. 134, this Court said (page 138):

> "The questions presented are (1) whether the State had territorial jurisdiction to impose the tax * * *."

The Court then discusses the matter of territorial jurisdiction and says (page 138):

> "*First*—As to territorial jurisdiction.—Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia the State had no jurisdiction to impose the tax. * * * The question has two aspects (1) as to work alleged to have been done outside the exterior limits of West Virginia * * *."

The opinion then specifically describes the activities which have just been declared to be non-taxable as a matter of territorial jurisdiction in the following language (p. 139):

> "1. A large part of respondent's work was performed at its plant at Pittsburgh. The stipulation of facts shows that respondent purchased outside the State of West Virginia materials used in the manufacture of the roller gates, lock gates, cranes, substructure racks and spur rims, structural steel, patterns, hoisting mechanism and equipment, under each of its contracts, and fabricated the same at its Pittsburgh plant. The roller gates and the appurtenant equipment were preassembled at respondent's shops at Pittsburgh and were there inspected and tested by officers of

> the United States Government. The materials and equipment fabricated at Pittsburgh were there stored until time for delivery, and the appropriate units as prepared for shipment were then transported by respondent to the designated sites in West Virginia and there installed. The United States knew at the time the contracts were made that the above described work was to be performed at the plaintiff's main plant. The contracts provided for partial payments as the work progressed and that all the material and work covered by the partial payments should thereupon become 'the sole property of the Government.' Payments by the Government were made from time to time accordingly.
>
> "It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the installation at the respective sites within that State and an apportionment would in any event be necessary to limit the tax accordingly. * * *"

The Circuit Court of Appeals faithfully followed the direction of this Court. It concluded that when this Court said, "this work done in Pennsylvania" was to be exempt from taxation, that this Court referred beyond question to the "work" it had described as being exempt from taxation, and having these descriptive elements: (1) work with respect to the acquirement of materials to be fabricated and the fabrication thereof at Neville Island; (2) work which the United States knew at the time the contracts were made was to be performed at Neville Island; (3) work for which partial payments were there made as work progressed, and (4) work which

upon said partial payments being made therefor became "the sole property of the Government." In other words, "work" which when performed completed a contractual undertaking carried on and consummated entirely outside West Virginia. The taxable privilege had been performed outside the taxing State.

Therefore, when this matter was presented to the Circuit Court of Appeals, its duty was plain under the opinion of this Honorable Court, and it proceeded to discharge that duty by saying that the exemption as to taxation related only to the "work" which this Court had described as being exempt from taxation, and hence the agreed and paid income which petitioner received from the Federal Government for that work in the form of partial payments whereupon said work became "the sole property of the Government" was the only income petitioner might justly claim as exempt from taxation. This is the position we have consistently maintained since the decision of this Court and one which the Circuit Court of Appeals reached without seeming difficulty.

If there were other classes of exempt income this Honorable Court would have said so. It dealt with all the other phases of territorial jurisdiction and specifically ruled in favor of the State with respect thereto. This Court laid down the rules and principles by which this tax was to be allocated and the Circuit Court of Appeals followed those rules and observed those principles.

THE TAXABLE ACTIVITY

Counsel for petitioner (petitioner's brief 18-21) seems confused in the meaning and use of the word "activity" by this Court and the Circuit Court of Appeals. It is argued that this Court meant that if any activity, no matter what it was, how small or how large, took place

outside West Virginia that some portion of some income must be allocated to that activity and thus rendered nontaxable. This Court described the activities it had reference to as bearing certain descriptive elements hereinbefore referred to. May we observe how well this Court's description of those exempted activities fits into the taxing statute here involved and its purpose. The tax is upon the business or privilege of contracting in the State of West Virginia. A construction contract was to be performed. It was to be a completed job in West Virginia. Contracting may involve various and sundry activities, but the ultimate object is a completed building or structure. Going back to this Court's description of the activities or the work declared by it to be exempt, we find beyond peradventure of doubt that that activity or that work in itself constituted a completed contract. In other words, the delivery of materials for fabrication and the fabrication thereof in Pittsburgh was a completed transaction within the terms and meaning of the contract with respect thereto. The business of contracting, the privilege of contracting, with respect to that work or that activity had taken place in Pennsylvania and not in West Virginia. Hence, West Virginia had no power to tax because the very privilege it sought to tax had been exercised outside its territorial boundaries. It was there that the parties specified the work was to be performed. It was there inspected by the Government, and finally it was there paid for and title then passed to the Government. It became a completed, separate and severable contract or operation contemplated by the main contracts. So, it is our view, as also was it of the Circuit Court of Appeals, that when this Honorable Court spoke of activities being exempt it meant the activities it had described; that it meant the activity or the privilege of contracting insofar as that had been performed elsewhere than in West Virginia.

It was as to this completed work, as to this complete performance of a separate function under the main contracts that this Court said the income therefrom should not be taxed. Income, if it please the Court, in the form of so called partial payments upon receipt of which title passed to the Government, thus completing the transaction for every practical intent and purpose.

Petitioner further urges (pages 21-22, petitioner's brief) that the decision of the Circuit Court of Appeals allows certain income declared exempt by this Court to be taxed one hundred per cent. Again petitioner is confused in the use of the word "activities." Petitioner states that under three of the four contracts an item such as structural steel was fabricated at Pittsburgh, and no partial payments being provided in the contract with respect thereto, payment being made only upon delivery and incorporation at the work site, that it having performed activities as to such structural steel outside of West Virginia, the decision of the Circuit Court allows the income therefrom to be taxed one hundred per cent when it should be exempted. The fallacy of this argument is at once apparent. The petitioner in its contract did not contract to do this work in Pennsylvania; it did not contract to have it inspected in Pennsylvania; it did not contract that it should be paid for in Pennsylvania; and it did not contract that title thereto should pass to the Government upon such payment in Pennsylvania. It is true that petitioner performed some work with respect thereto outside of West Virginia, but it did not complete a contract with respect thereto, but its completed contract relative to these articles was consummated in West Virginia, the taxable jurisdiction. There the taxable activity took place and not in Pennsylvania. This argument is true with respect to some other articles, such as lock gates, cranes and patterns which petitioner refers to.

This Court cannot but recognize that it is economically inevitable that some material and equipment in the performance of almost any contract or work must be obtained from places outside the taxing State. The procurement of such materials and equipment, of course, represents a form of activity carried on beyond the taxing State. Yet their cost may enter into and make up part of the gross income which the contractor receives. The contractor is taxed for the privilege of carrying on a contracting business which is the building of a structure rather than the procurement of the necessary materials and equipment, and a tax with respect thereto is valid even though it may involve activities outside the taxing State. *Western Livestock* v. *Bureau of Revenue*, 303 U. S. 250; *American Manufacturing Company* v. *St. Louis*, 250 U. S. 459; *Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143. As said by the Circuit Court of Appeals, *Dravo Contracting Company* v. *James*, 114 F. (2d) 242, at page 246:

> "The fact that the contractor may have prepared materials in other states for use under the contract is immaterial, if they were used in the performance of the contract in West Virginia and payments made the contractor were dependent upon such use."

It is further argued (petitioner's brief, 22-25) that the income represented by partial payments upon delivery of certain materials and fabrication thereof at Pittsburgh, specifically mentioned and declared by this Court and the Circuit Court of Appeals to be exempt from taxation, does not go far enough inasmuch as those partial payments do not cover the cost to petitioner of the specific work performed. It is asserted that testimony shows that at least eighty per cent of the unit price of the articles there fabricated was represented by the cost of such ma-

terial and fabrication outside West Virginia, while the partial payments made therefor would amount to only sixty or sixty-five per cent of the cost of the work there performed. Petitioner loses sight of the fact that it solemnly agreed in its contract with the Federal Government to take a certain amount represented by specific partial payments for this completed work in Pennsylvania, whereupon "title passed to the Government," thus completing the contract with respect to that particular phase of the work. Petitioner's Vice-President, Mr. Miller, states that there was no relationship between partial payments and actual value. Nevertheless, his Company agreed to take so much for certain work, whereupon complete title passed. Surely there was some relationship between the payments made and the value. What evidently was meant was that the payments made did not fully reimburse for the cost of these materials and the fabrication carried on in Pittsburgh, but this Court can readily recognize that a roller gate, or a lock gate, or a piece of a dam, sitting in the shops or in the yard of Petitioner in Pennsylvania is not there worth its cost, because it is intended for use in West Virginia in a dam or in a lock where it there assumes a value even above the actual cost of installation.

The above argument is applicable as well to other articles and instances cited in petitioner's brief.

RECENT DECISIONS OF THIS COURT

Fault is found with the opinion of the Circuit Court of Appeals (petitioner's brief, 29-32) in its likening the present case and the principles involved to those discussed and laid down by this Court in certain recent decisions dealing with gross sales taxes, especially *McGoldrick* v. *Berwind-White,* 309 U. S. 33. The principle of the right of a State to tax with respect to a taxable event occurring in

the State is without question even though many extra-state activities and interstate commerce may have been involved prior to the happening of the taxable event, or exercise of the taxable privilege. In this case the taxable event, so to speak, or the taxable privilege, is that of contracting; that of completing a contract. This Court, as well as the Circuit Court of Appeals, has said that where such takes place, as in the case of certain fabrication of materials outside of West Virginia, thus completely performing a certain phase of the contract, and for which full payment is made and title passes, that West Virginia may not tax; but with respect to the other work or the other activity of petitioner, such was not completed until the taxing jurisdiction of West Virginia had been invaded and the taxable event or taxable activity took place in that jurisdiction. See also in this connection *Graybar Electric Company* v. *Curry*, 238 Ala. 116, 189 So. 186; 308 U. S. 513. This Court, in *Ford Motor Company* v. *Beauchamp*, 308 U. S. 331, page 337, pointed out that the opinion in the *Dravo* case exempted from taxation the work done in other states for which the contractor was paid in other states. In other words, a contractual undertaking entirely completed outside the jurisdiction of the taxing state—paid for, title had passed.

REFUSAL TO ENJOIN THE COLLECTION OF THE ENTIRE TAX

It is argued (petitioner's brief, 36-38) that no apportionment whatsoever can be made and that the collection of the entire tax should be enjoined. If this argument be sound under the circumstances and facts of this particular case then this Court indeed ordered a vain and empty thing when it directed that the case be remanded to the District Court for an apportionment in accordance with this Court's opinion. We do not attribute to this Court idle gestures of this sort. This Court considered the taxing statute here involved and

all the facts of the case were before it. If the statute was such which under the particular facts here involved an apportionment could not have been made, this Court, in our humble judgment, would have said so. The Circuit Court of Appeals aptly observed that this question was expressly raised in this Court and by the action of this Court in remanding the cause such was decided in favor of the State. *Dravo* v. *James*, 114 F. (2d) 242, 245.

CONCLUSION

We, therefore, respectfully submit that the decision of the Circuit Court of Appeals is not in conflict with the applicable decisions of this Court, and particularly not in conflict with the decision of this Court heretofore made in this case; further, that none of the grounds referred to in Section 5, Rule 38, of this Court, indicating the character of reasons which this Court will consider in awarding a writ of certiorari are here presented, our belief being that the Circuit Court of Appeals followed with particularity the principles enunciated and the direction made by this Honorable Court in its prior opinion in this case.

Wherefore, it is submitted that the writ of certiorari as prayed for should be promptly denied by this Honorable Court.

Respectfully submitted,

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